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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
Redevelopment of Spectrum to	)	
Encourage Innovation in the	)	ET Docket No. 92-9
Use of New Telecommunications	)	
Technologies	)	

To: The Commission

PETITION TO HOLD ADMINISTRATIVE HEARINGS

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SUMMARY

On February 7, 1992, the Federal Communications Commission issued a notice of proposed rulemaking to set aside 220 MHz of spectrum between 1.85 and 2.20 GHz for future use by "emerging telecommunications technologies." The proposed action, as the Commission recognizes, would effectuate the relocation of literally thousands of existing fixed microwave users. Although it apparently recognizes the enormity of its proposal, the Commission has afforded those affected little opportunity to engage the agency in a meaningful discussion of the complex issues involved. Rather, the Commission has merely solicited written comments.

Administrative hearings should be held in conjunction with this significant rulemaking proceeding. While the Commission may not be legally compelled to do so, the holding of administrative hearings furthers the underlying policy and goals of the Communications Act to provide access to the Commission decisionmakers when modifications to a license are proposed. Notions of fairness and equity also support the holding of such hearings.

The importance of the proposed rulemaking at issue to existing licensees -- including Seattle City Light -- cannot be

underscored. Accordingly, Seattle City Light requests that the Commission provide an interactive setting, in the form of administrative hearings, for the exchange of comments and concerns on both sides.

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PETITION TO HOLD ADMINISTRATIVE HEARINGS

Seattle City Light, by its undersigned counsel and pursuant to 47 U.S.C. § 303(f) and 47 C.F.R. § 1.1, hereby petitions the Federal Communications Commission ("Commission" or "FCC") to hold administrative hearings in conjunction with the above-captioned proceeding. As discussed below, the very magnitude of the proposed rulemaking at issue and the numbers of parties that will be affected by it -- including Seattle City Light's -- compel that the Commission provide an interactive setting where the comments and concerns of these parties can be fully addressed, and where the Commission's position on the myriad of questions this proposal raises can be clarified. Only administrative hearings offer this opportunity.

INTRODUCTION AND BACKGROUND

1. On February 7, 1992, the Commission released its notice of proposed rulemaking styled In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9 (hereinafter

referred to as "Emerging Technologies NPRM").1/ Also, the Commission has pending before it a number of petitions and proceedings addressing requests for allocation of spectrum to operate new services that would utilize innovative technologies. Thus, by the notice, the Commission proposes to set aside 220 MHz of spectrum between 1.85 and 2.20 GHz for use by "emerging telecommunications technologies," and, in order to do so, the Commission alleges that it must, and proposes to, displace existing fixed microwave users and relocate them to other fixed microwave bands or alternative media.

2. To accommodate the alleged need to clear spectrum for emerging technologies, the Commission proposes to permit existing users to relocate to the fixed common carrier microwave bands above 3 GHz. According to the Commission, its study found that

> the private and common carrier fixed microwave operations using this spectrum [220 MHz of the spectrum between 1.85 and 2.20 GHz] can be relocated to higher frequency bands that provide for similar type services and can support propagation over similar path lengths. Further, it [the study] observes that there are other reasonable alternatives for fixed microwave such as fiber, cable and satellite communications, which can utilize off-the-shelf equipment to provide these services.

Emerging Technologies NPRM at 8.

1/ A summary of the Commission's notice of proposed rulemaking appeared in the February 19, 1992, issue of the Federal Register. 57 Fed. Reg. 5994 (Feb. 19, 1992).

3. The Commission's proposal indicates that the agency will "pursue this reallocation in a manner that will minimize disruption of the existing 2 GHz fixed operations." Emerging Technologies NPRM at 9. Despite this assurance, the proposal is troubling. First and foremost, is the question of the need to clear this band for emerging technologies when the current users provide support to the provision of critical public safety services. Moreover, while the Commission makes a vague reference to "a broad range of new radio communication services," the Commission identifies only a handful of these avowed services but has not consolidated the proceedings designated to consider any pending applications of new radio communication services with the present proceeding, thus failing to provide one forum where this issue can be examined in its totality rather than on a piecemeal basis. Second, the Commission specifically states that applications by existing licensees in the 1.85-2.20 GHz bands for new facilities submitted after the adoption date of the NPRM will be granted on a secondary basis only, conditioned upon the outcome of the proceeding. Emerging Technologies NPRM at 11.2/

2/ On May 14, 1992, apparently in recognition that most major modifications will not significantly affect the use and availability of existing 2 GHz spectrum, the Commission issued a clarification on this issue stating that the conditional secondary status would not be applied to certain enumerated modifications of facilities licensed prior to January 16, 1992. See Federal Communications Commission Public Notice 23115 (May 14, 1992). The FCC also noted that "the conditional secondary status will not be applied in certain situations where additional links may be required to complete a communications network, or where new facilities and/or frequencies are operationally connected to a system, licensed prior to January 16, 1992." Id.

Third, although the Commission states that during the period of transition, currently licensed 2 GHz fixed licensees will continue to occupy 2 GHz frequencies on a co-primary basis with new licensees, the Commission never establishes the precise definition of "co-primary." The absence of a specific definition raises concerns about the applicability of the "first come, first served" principle in the event of interference. Fourth, pursuant to the Commission's proposal, at the end of the transition period the currently licensed 2 GHz fixed licensees' facilities can continue to operate in the band on a secondary basis only. These issues touch on only a few of Seattle City's many questions about the Commission's proposal, which Seattle City seeks to explore with the Commission in the context of administrative hearings.

4. Seattle City Light is a municipal power utility, owned, operated, and regulated by the City of Seattle. Seattle City Light serves over 669,000 residents in a 131 square mile area, including the City and some adjacent areas of King County.

5. Seattle City Light currently operates 11 microwave lengths in the 1850-2200 MHz band. Two additional microwave hops are anticipated to be installed within the City limits. Seattle City Light uses microwave radio to control generation and to provide dam failure alarming, emergency communications, and other services which provide safety to the general public. Therefore, it is imperative that the communications path and operating

frequencies be the most reliable possible, since failure of such communications medium could jeopardize human life. Some of Seattle City Light's existing 2 GHz microwave lengths are in excess of 70 miles. If Seattle City Light is forced to vacate the 1850-2200 MHz band, Seattle City Light would likely be forced to use a 6 GHz or higher band. Microwave transmission and reception operating in the 6 GHz or higher bands for this distance will not be able to provide the same reliability as 2 GHz band transmission and reception. Further, weather and other natural obstacles cause more microwave communications path fades using 6 GHz or higher than when 2 GHz is used. Moreover, at this time, it is uncertain whether there are any other microwave frequencies available for the areas in which Seattle City Light currently operates and in order to install replacement microwave equipment, a frequency coordination study must be performed to determine the frequency to be used that would not cause interference to other users. Finally, in addition to the vital public safety concerns at issue, the removal and replacement of Seattle City Light's 11 microwave lengths will be very costly for a utility of Seattle City Light's size, approaching the $2.5 million range. Since the Commission has proposed in this proceeding to reallocate spectrum in the 2 GHz band for use by "emerging technologies," and Seattle City Light has a vital interest in the continued use of the 2 GHz spectrum, Seattle City Light is extremely concerned about the outcome of this proceeding.

DISCUSSION

6. The Supreme Court has noted that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1942). In the 1981 Supreme Court decision in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), the Court recognized the Commission's "broad power to regulate in the public interest," and that the agency's general rulemaking authority permits it to implement its view of the public-interest standard of the Act provided that view is based on a consideration of the relevant factors and is otherwise reasonable. Id. at 594.

7. The FCC's delegated powers include the power to allocate frequencies in the public interest. 47 U.S.C. § 303(c). Further, Section 303(f) of the Communications Act of 1934 confers upon the Commission the power to make "such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act." 47 U.S.C. § 303(f). Congress conditioned this grant of broad power to the Commission, however, by requiring that changes in the frequencies, authorized power, or in the times of operation of any station, could not be made by the agency without the consent of the station licensee unless, after a public hearing, the Commission determined that such changes were in the

public interest. Id. Similarly, Section 316 of the Act prohibits the Commission from modifying any station license or construction permit, either temporarily or on a permanent basis, in the public interest unless the FCC has notified the holder of the license or permit in writing of the proposed action and has given the holder reasonable opportunity (not less than thirty days) to show cause by public hearing, if requested, why the order of modification should not be effected. 47 U.S.C. § 316(a).

8. Some courts have held that the Commission may make decisions of general applicability, which effectively change frequencies or modify existing station licenses, by rulemaking without holding individual adjudicatory hearings, despite the literal language of the provisions of the Communications Act. See, e.g., WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir. 1968) (when a new policy is based upon the general characteristics of an industry, the agency is not required to hold individual hearings); Conley Electronics Corp. v. FCC, 394 F.2d 620, 625 (D.C. Cir. 1968) (when rules of general application are promulgated in a valid rulemaking proceeding, they may be generally applied by the FCC without individual adjudicatory hearings). However, two factors distinguish those cases from the present proceeding, and suggest that, at a minimum, administrative hearings on the Commission's 2 GHz proposal should be held in this instance.

9. First, in cases where courts have held that adjudicatory hearings were not required, the Commission had in fact held hearings during the rulemaking process -- thereby providing an opportunity for an interactive dialogue between interested parties and the agency. See Springfield Television of Utah, Inc. v. FCC, 710 F.2d 620 (10th Cir. 1983) ("[a] fair hearing was given to all interested in the proceedings"). Indeed, in the seminal case involving the issue of decisionmaking by rulemaking rather than by adjudication, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Supreme Court opined:

> . . . We agree with the contention of the Commission that a full hearing, such as required by [§ 309] . . . would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Id. at 205 (emphasis added); see also Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954) (where the Commission allocated frequencies among communities on the basis of one master plan, arrived at through one master hearing).

10. Second, in those cases where no hearings whatsoever have been held (either adjudicatory or administrative), the rules at issue provided for a waiver upon the proper showing, an important factor relied upon by the courts in reaching the decision that hearings were not required. Thus, in WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir. 1968), the Second Circuit rejected the argument that the Commission was required to hold adjudicatory hearings in establishing a new system of "presunrise" operation by certain classes of AM radio stations, but noted that the Commission's rules contained a provision for waiver, similar to that relied on in the Storer case:

> . . . we have no reason to doubt that if a particular fulltimer should be able to make a preliminary showing that presunrise authorization to a day-timer or limited nighttimer would cause a degree of harm not contemplated in the rule making, the Commission would hear him.

Id. at 618 (emphasis added).

11. In the present proceeding, the Commission has not scheduled any administrative hearings nor does its proposal indicate that any provision will be made to waive the applicability of the final rule upon the proper showing by an affected party. Apart from limited meetings where panel discussions have occurred, a procedure which effectively restricts the presentation of testimonial and documentary evidence to the Commission and the examination of the Commission's own views, the Commission has made no provision to

address the concerns of affected parties in an interactive setting where the issues involved can be fully explored. Where an agency undertakes a rulemaking of the magnitude involved here, affected parties must be afforded an opportunity to express their views in a meaningful way. In the instant case, the submittal of written comments simply does not suffice.3/

12. The principles espoused in the Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), are apposite here. In Ashbacker, the pivotal case on Commission

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3/ The procedures followed by the Occupational Safety and Health Administration ("OSHA") in considering the adoption of an occupational safety and health standard on hazard communication are illustrative of the proper administrative course to pursue when significant issues are involved, affecting significant numbers of parties. See 48 Fed. Reg. 53280 (Nov. 25, 1983). There, OSHA published its NPRM on March 19, 1982, establishing a sixty day notice period for submission of written comments and the filing of a notice of intent to appear at public hearings. The deadline for submission of written statements and other documentary evidence to be presented during the hearings was set for June 1, 1982. All written evidence concerning the NPRM was entered into the docket established for the rulemaking proceeding. Public hearings were conducted, presided over by an administrative law judge, and all participants were given the opportunity to present oral testimony and to question other witnesses. The hearings were held from June 15-24, 1982, in Washington, D.C.; July 13-14, 1982, in Houston, Texas; July 20-23, 1982, in Los Angeles, California; and July 27-31, 1982, in Detroit, Michigan. A total of 4,253 pages of transcript was generated during the nineteen days of oral testimony. The hearing participants were permitted to submit additional information to the record until September 1, 1982. The period for submission of post-hearing comments, which was extended upon the request of participants, ended on November 1, 1982. By adopting this procedure, which is at odds with the FCC's current minimalist procedure, OSHA ensured that its rulemaking proceeding gave adequate attention to the public's and the regulated community's right to participate in that process in a meaningful way.

procedures where mutually exclusive licenses are involved, the Supreme Court addressed the issue of whether the FCC, having before it two applications for licenses which were mutually exclusive, could properly grant one without a hearing and conditionally deny the other while setting the matter for a hearing. The Court held that it could not. As the Court articulated,

> We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports it grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their application becomes an empty thing.

Ashbacker, 326 U.S. at 330.

The Court in Ashbacker was concerned not with 'legal theory,' but instead with the 'practicalities.' See, id. ("Legal theory is one thing. But the practicalities are different."). Thus, although legally the Commission had not violated the statutory right of a petitioner to a hearing on its application, the Court held that as a practical matter those rights had been nullified. Id. at 334.

13. While the posture of the instant proceeding may not be legally identical to an Ashbacker situation, in effect a mutually exclusive circumstance is presented: that is, what the Commission takes from the existing 2 GHz licensees it proposes to give to

the so-called "emerging technologies," and in the end, both cannot have the spectrum at issue. To provide a meaningful opportunity for comment, the overriding concern of the Court in Ashbacker, the Commission must confront all issues and all affected parties -- the existing 2 GHz users and those allegedly in need of the spectrum -- together in an interactive setting where the issues and conflicting interests of the parties can be simultaneously and thoroughly examined. Any lesser procedure plainly does not fulfill the Commission's affirmative duty to consider the public interest, convenience and necessity in regulating communications.

14. The FCC's current proposal, as the Commission acknowledges, is "one of the Commission's most important efforts." Indeed, the FCC identified almost 30,000 fixed microwave facilities in the 2 GHz bands that would be affected by its proposal. Creating New Technology Bands for Emerging Telecommunications Technology, Office of Engineering and Technology, OET/TS 91-1, at 18. Moreover, the proposal would surely create significant public safety concerns in light of the large numbers of local governments, petroleum producers, power utilities and railroads that currently operate in the 2 GHz frequencies. Given the statutory directive that the Commission allocate the spectrum in a manner that promotes the "safety of

life and property," 47 U.S.C. § 151[4]/, where reallocation will jeopardize life and property, such as here, an opportunity to be heard at a hearing is especially important.

15. The ramifications of the FCC's present proposal are potentially enormous. If implemented, the rulemaking will effectuate the displacement of literally tens of thousands of licensees whose operations include law enforcement, firefighting, providing electric, gas, and water services, and rail transportation. Apart from the significant costs of relocation to these licensees, which may well run in the millions of dollars for individual licensees whose business operations are already financially troubled, serious public safety issues are implicated. These public safety issues are of concern not only to the traditional "public safety" sector (such as police and fire departments), but to thousands of other existing licensees whose operations -- if disrupted -- pose hazards to the public and thus do, in fact, involve public safety in a real way. Yet with nothing more than an opportunity to present their views on an impassive piece of paper, and with no apparent ability to obtain relief from this action in the way of a waiver, the Commission proposes a massive displacement of existing 2 GHz

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4/ See S. Rep. No. 191, 97th Cong., 2d Sess. 14 (1981), reprinted in 1982 U.S. Code Cong. & Admin. News 2237, 2250 ("radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury.").

users. This 'exchange of paper procedure' is simply inadequate in the present context.

16. The importance of the issues involved in this proceeding and the number of affected parties compels the holding of administrative hearings by the Commission to allow Seattle City and other interested parties to present their views directly to the Commission. The holding of such hearings will not prejudice the interests of the Commission or of any potentially affected parties nor will it unduly delay the progress of this proceeding. And, as in Ashbacker, "[t]here is no suggestion, let alone a finding, by the Commission that the demands of the public interest [are] so urgent as to preclude the delay which would be occasioned by a hearing." Ashbacker, 326 U.S. at 333. On the contrary, such hearings will contribute to a fair, equitable and efficient outcome to the Commission's rulemaking efforts by ensuring that all those interested in and affected by the proceeding are allowed to offer their comprehensive comments on the Commission's proposal in an interactive setting where the ramifications of displacing so many critical communication links can be fully explored. Moreover, the holding of administrative hearings will allow the Commission to comment on the various issues raised, as well as to address subsequently posed concerns.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Seattle City Light respectfully requests that the Federal Communications Commission grant its petition to hold administrative hearings in the above-referenced proceeding and requests that the Commission hold in abeyance the promulgation of any final rule pending such hearings and a thorough examination of the evidence offered therein.

Respectfully submitted,

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